IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARY C. FORD, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF SAMUEL FORD, A MINOR, AND SAMUEL F. FORD, INDIVIDUALLY,

Plaintiffs,

v. No.1:93CV213-S-D

GUARANTY NATIONAL INSURANCE COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendants.

OPINION

This cause is before the court upon the summary judgment motions of the defendants in this declaratory judgment action. The underlying cause of action was a malpractice suit against North Mississippi Medical Center which was partially settled in 1992. Defendant Guaranty National did not participate in the settlement and Defendant United States Fidelity & Guaranty (USF&G) participated only in a partial settlement. The plaintiffs received approximately one-half of the settlement in exchange for the release of both the Medical Center and USF&G. As part of the settlement, the Fords were left to pursue the remainder of the settlement proceeds from Guaranty through an assignment from the Medical Center. At the heart of this cause is a dispute between the insurance companies regarding the applicable year of coverage under the hospital professional liability insurance policies.

THE FACTS

In August 1980, Mary Ford gave birth to a child at the North Mississippi Medical Center in Tupelo, Mississippi. Medical personnel mistyped the child's blood and, as a result, failed to detect Rh factor incompatibility between mother and son. As a consequence of this error in 1980, Mary Ford did not receive an injection of RhoGAM immediately after the birth which would have

prevented Mary Ford's blood from being irreversibly "sensitized" to Rh positive blood types of future fetuses. At the time of the mistyping, USF&G insured the Medical Center under two policies of insurance, a primary and an excess policy, providing by separate endorsements coverage for comprehensive general liability, personal liability, and hospital professional liability.

In April 1983, Mary Ford gave birth to another child at University Hospital in Jackson.[1] The child, Samuel Ford, a plaintiff, had Rh positive blood. Several years later, Samuel Ford was diagnosed as having suffered a narrow band of hearing loss due to his mother's sensitization of his blood.[2] In June of 1989, Mary Ford and her son, Samuel Ford, sued the North Mississippi Medical Center alleging medical malpractice arising from the blood mistyping and failure of the Medical Center to administer the RhoGAM immediately after the 1980 birth. At the time of Samuel's birth in 1983, the Medical Center held primary and excess policies of insurance with USF&G and, additionally, held a second level policy with Guaranty National. Guaranty National did not insure the Medical Center for any risk prior to October 1, 1981.

In July of 1989, the plaintiffs filed an amended complaint in state court against the Medical Center for their malpractice claims. From the exhibits submitted for summary judgment purposes, it is clear that USF&G took the position early in the claim that its 1983 policy, rather than the 1980 policy, covered the Fords' medical malpractice claim.[3] On December 20, 1990, Guaranty National corresponded with the Medical Center concerning the Ford claim. Because Guaranty did not have information regarding either pregnancy, it questioned the date of loss and, further, reserved its rights to contend that the 1980 policies covered the loss rather than the 1983 policies. Guaranty requested

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[1]There is no complaint against the University Hospital for any actions taken at the time of Samuel Ford's birth in 1983. Likewise, the North Mississippi Medical Center did not administer pre-natal or post-natal care to Mary Ford or Samuel Ford in 1983. University Hospital and North Mississippi Medical Center are not affiliated and, at all times pertinent to this case, University Hospital was not insured by either USF&G or Guaranty National.

[2]Causation as well as the statute of limitations were issues initially raised at the beginning of the suit, but gave way apparently to issues concerning the applicable coverage.

[3]Neither the hospital nor USF&G could locate the 1980 policies during the settlement process.

documentation on the loss and questioned USF&G's allocation of the loss to 1983. After a second request from Guaranty, USF&G responded by confirming that it was allocating the loss to the 1983 policy for which USF&G had $838,000 available under its primary and first layer excess 1983 policies.[4] It offered no explanation for its position.

Beginning in 1990 and continuing through 1992, counsel for the hospital estimated the claim to be in the range of $500,000 to $750,000--amounts clearly within the limits of the USF&G policies.[5] Based upon these representations, Guaranty urged USF&G in a letter dated March 24, 1992 to settle the claim. In April of 1992, the plaintiffs indicated they would settle for $1.1 million.

On July 2, 1992, Guaranty reiterated its concern over the allocation of the loss to the 1983 policy. In her letter to USF&G, Jane Brown of Guaranty wrote:

> Since our umbrella liability coverage is on a following form basis, we have requested that you provide us with copies of your underlying policy so we may determine whether your coverage is on a standard malpractice form whereby the coverage is triggered by the negligent act, or whether the manifestation of the resultant injury triggers your coverage. . .I am sure you understand why we are not in a position to make any commitments with regard to excess coverage at this point.

For the remaining month, USF&G continued to stand by its position that the 1983 policy applied without explanation. Likewise, the Medical Center continued to value to claim in the area of $750,000.

USF&G sought an opinion regarding policy coverage from outside counsel in late July of 1992. The opinion letter states that coverage could be applied under either the 1980 or 1983 policy. According to the opinion, the 1980 policy could apply if the "medical incident" had been the mistyping of blood. In regard to the 1983 policy, coverage could be obtained if the occurrence had been when the complaining party was actually damaged.[6] In support of this proposition, the opinion

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[4]At this time, the plaintiffs' demand for settlement was $2.375 million.

[5]Apparently, counsel for the hospital represented USF&G's interest as well.

[6]According to the author of the opinion letter, this is the prevailing view of an "occurrence type" policy. The court notes that while this may be a true statement in regard to general liability policies, it is a strained interpretation of "act or occurrence" policies with regard to professional malpractice policies.

letter states:

> In this case, the actual damage or injury to each plaintiff occurred when Mrs. Ford gave birth to Sam Ford in 1983. This mitigates in favor of coverage under the 1983 policy.
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> Moreover, the court could conclude not only that the hospital was negligent in the mistyping of the blood, but also by its failure to discover the error before March of 1983. And a strong argument can also be made that even under a strict interpretation of "medical incident" as defined in the policy, there was in fact a "medical incident" which occurred in 1983. This adds more weight to the argument that the 1983 policy is applicable.

The opinion letter concludes by stating that ambiguity exists in the policies since either could apply. Further, the author of the letter suggests that the insured would be entitled to greater indemnification should the 1983 policy apply.[7] The letter closes by pointing out that where ambiguity exists in insurance contracts, the interpretation most favorable to the insured will be applied by the courts.

On July 29, 1992, counsel for the Medical Center notified USF&G and the hospital that a settlement conference had been scheduled for August 14, 1992. On August 7, 1992, counsel for the Medical Center notified the plaintiffs by letter that Guaranty National "denied coverage applicable to this lawsuit." By letters dated August 10, 1992, USF&G and counsel for the Medical Center invited Guaranty National to attend the settlement conference to be held four days later.[8] Counsel for the Medical Center further advised that it anticipated USF&G to offer its limits at the settlement conference and, therefore, it expected Guaranty National to assume defense of the case. Guaranty responded by again questioning coverage under the 1983 policy and requested information regarding the analysis leading to the conclusion that the 1983 policy applied. USF&G responded by faxing a copy of the opinion letter by independent counsel. After receiving the opinion letter, Jane Brown of Guaranty replied via fax by pointing out that the opinion letter mentioned a $1,000,000 excess policy in 1980. Brown suggested that if the $1,000,000 excess policy was with USF&G and not impaired then it appeared to be within the limits of the demand. On August 13, Brown faxed a note

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[7]The 1980 policy had only $1,000,000 in excess coverage while the 1983 policy, including the coverage afforded by Guaranty National, had $20,000,000 in excess coverage.

[8]Guaranty was not represented at the settlement conference due to the late notice of the meeting.

to counsel for the Medical Center explaining that Guaranty was waiting for confirmation from USF&G

> that they will proceed to negotiate a settlement of this matter within the $1.1 million demand, with the understanding that they waive no rights to proceed against us by doing so. The Insurers can then work out the coverage disagreements between themselves with no excess exposure to the Insured if there is $2 million of coverage available in 1980 as indicated.

Brown then faxed a note to USF&G requesting confirmation that USF&G would settle the case within the 1.1 million dollar demand and "that we will then proceed to settle our coverage differences." USF&G replied that because the limits of the 1980 policy were impaired, USF&G did not have $1.1 million aggregate left on the 1980 policies. USF&G further stated that it "is not in agreement to settling within $1.1 million and resolving the coverages difference with Guaranty National." Additionally, USF&G maintained the 1983 policies applied.

By formal letter to USF&G dated August 13, 1992, one day before the settlement conference, Jane Brown reconfirmed Guaranty's position that the 1980 policies applied even after having reviewed the opinion letter and that Guaranty firmly believed that the current demand was well within USF&G's coverage limits. Brown further requested that USF&G settle and fund the claim within the 1.1 million dollar demand. Brown agreed that by doing so, USF&G would not be deemed to have waived its rights to proceed against Guaranty for coverage under the umbrella excess policy. "This will afford protection to the insured, and allow us to work out the coverage disagreements between us. . .we rely on you to handle negotiations," Brown wrote.

Following the settlement conference on August 14, 1992, counsel for the Medical Center wrote two letters to Jane Brown informing Guaranty that USF&G tendered its remaining aggregate limits of $838,000 at the settlement conference and that the Medical Center "interpreted your recent communications as denying coverage by Guaranty National." The Medical Center called upon Guaranty to assume defense of the suit and to settle the demand of $1,200,000. On August 24, 1992, Jane Brown faxed a reply to counsel for the Medical Center agreeing to fund the balance of the settlement up to the $1.2 million demand and reserving any rights against the parties pending

resolution of the coverage dispute. The would not seek recourse against the Medical Center.[9] At the same time, Brown proposed to USF&G that the two insurance companies split the settlement amount and then submit to arbitration. USF&G refused relying on the assumption that the 1983 policies applied to the claim. On August 31, 1992, Jane Brown repeated Guaranty's agreement to fund the balance of the 1.2 million dollar demand along with its reservation of rights against any and all parties.

On October 15, Brown wrote to USF&G requesting status of the case after having been referred to counsel for the Medical Center by USF&G but having received no response. USF&G forwarded the Guaranty National letter to counsel for the Medical Center for response. A month later on November 16, 1992, counsel for the Medical Center informed Guaranty that no obligation existed to inform Guaranty of the settlement status and, further, that the Medical Center had assigned its rights against Guaranty to the plaintiffs.[10]

In the Covenant Not to Sue, dated November 6, 1992,[11] USF&G represented and warranted that its remaining limits under the applicable insurance policy was $838,000. USF&G further represented that it was the only company acknowledging coverage, but that Guaranty National provided an additional policy to the Medical Center. Relevant language in the Covenant is as follows:

> [I]n consideration for Claimants executing this Covenant Not to Sue or Execute and Assignment of Rights, NMMC agreed to settle this action for the amount of $1.2 Million Dollars. The parties to this instrument agree that, if Guaranty National had acknowledged coverage, this claim could have been settled for $1.2 Million Dollars. In light of Guaranty National Insurance Company's failure to

[9]A few days later, the Medical Center would accuse Guaranty of breaching its contractual obligations and considered Guaranty's "latest position of offering funds on behalf of North Mississippi Medical Center while attempting to reserve rights of future recourse against the Medical Center pertaining to those funds to be indicia of bad faith."

[10]The Assignment of Rights, dated October 28, 1992, two weeks after Guaranty's request on the status of the settlement, was made in consideration of the Covenant Not to Sue entered into by the plaintiffs and contingent upon approval by the Chancery Court of the Covenant Not to Sue.

[11]The court notes that the Covenant was signed three weeks after Guaranty's request.

> acknowledge coverage in this matter for the $362,000.00 of the settlement amount in excess of the $838,000.00 coverage provided by USF&G, and further in light of the contingent nature of the collection of these insurance proceeds by Claimants against Guaranty National necessitating further litigation through assignment of rights as hereinafter set forth, and in recognition of the diminished value of assigned rights as opposed to cash payment, NMMC expressly agrees and stipulates to settle this matter for an additional $400,000.00, to be collected as hereinafter set forth.

Through the agreement, the Fords released both the Medical Center and USF&G. On February 25, 1993, the Fords filed a third-party complaint against Guaranty National in state court requesting the remainder of the settlement proceeds as well as $5,000,000 in punitive damages for bad faith denial of insurance coverage. Guaranty removed the cause of action to this court, moved for summary judgment, and filed a cross-claim and counter-claim. The plaintiffs amended their complaint to add USF&G as a party defendant based upon USF&G's misrepresentation that its liability limits had been exhausted. The plaintiffs seek a determination from this court declaring which policies apply and determining whether the limits of those policies have been exhausted.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When a proper motion for summary judgment is made, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Gibson v. Rich,* 44 F.3d 274, 276 (5th Cir. 1995).

THE POLICIES

USF&G insured the Medical Center under primary and excess professional liability policies in August of 1980. The primary policy has limits of $100,000 for each medical incident and $300,000 aggregate. The excess coverage had single limits of $1,000,000. North Mississippi Medical Center had no additional professional liability coverage in 1980.

In April of 1983, USF&G provided primary professional liability insurance and first level excess coverage with the same limits as the 1980 policy. Guaranty National Insurance Company provided a second level of excess coverage with single limits of $9,000,000. However, the second layer excess HPL coverage Guaranty National provided beginning on October 1, 1981, and continuing through October 1, 1983, was on a "following form"[12] basis over USF&G's first layer excess HPL coverage terms.

Both the USF&G 1980 primary and initial layer excess HPL policies provide, in relevant part, that:

> The company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to which this insurance applies, caused by a medical incident which occurs during the policy period.

Under the policy, "medical incident" is defined as "any act or omission in the furnishing of professional health care services." Similarly, USF&G's 1983 primary and initial layer excess HPL policies provide the identical language. Thus, the primary and umbrella liability policies issued by USF&G for Hospital Professional Liability coverage is properly classified as "act or occurrence" policies.[13] Because Guaranty National's umbrella liability policy was on a "following form" basis, the coverage under it is classified as an "act or occurrence" policy as well.

SUMMARY JUDGMENT MOTION BY GUARANTY NATIONAL

Guaranty moves for summary judgment on all claims asserted by the plaintiffs against it. Guaranty argues that the terms of the policies are not ambiguous and, further, that the 1980 policies apply to the claim. By contrast, the plaintiffs argue that the policies are ambiguous and that resulting

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[12]The terms and conditions of the primary policy (USF&G's) would apply to the coverage afforded by Guaranty National.

[13]"A 'discovery policy' is one wherein the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurer within the policy term, whereas an 'occurrence policy' is a policy in which the coverage is effective if the negligent act or omitted act occurs within the policy period, regardless of the date of discovery." Appleman, Insurance Law and Practice (Berdal, ed.) §4504.01.

injury or damage is necessary before a tort is complete. In regard to the ambiguity, the court finds that none exist. A conclusion to the contrary would be rather odd considering the policies use identical language. Where the terms and provisions of an insurance contract are clear and unambiguous, it should be construed as written. *Caldwell v. Hartford A & I Co.*, 160 So.2d 209, 211 (Miss.1964). Absent ambiguity, the language of an insurance contract is dispositive. *Childers v. Pumping System, Inc.*, 968 F.2d 565,569 (5th Cir. 1992). This court has previously said:

> It is equally well settled that "the special rules favoring the insured are only applicable when there is an ambiguity ... [and that] courts ought not to strain to find such ambiguities, if, in so doing, they defeat probable intentions of the parties ... even when the result is an apparently harsh consequence to the insured,".... Courts will neither create an ambiguity where none exists nor make a new contract for the parties.... If the policy language is clear, unequivocal, and, hence, unambiguous, its terms will be enforced, ... since "[t]he power to make such contracts as the parties desire to make, when not prohibited by law or public policy, is a fundamental principle of the ... insurance business, and is essential to its successful conduct.

Ware v. Carrom Health Care Products, Inc., 727 F.Supp. 300, 304-05 (N.D.Miss. 1989) citing

Brander v. Nabors, 443 F.Supp. 764, 769 (N.D.Miss.), aff'd, 579 F.2d 888 (5th Cir.1978).

Absent ambiguity in the terms and provisions of the policies, the court looks to the plain language of the policies. The policies are clearly "act or occurrence" type providing coverage for a "medical incident." The parties disagree as to the proper definition of "medical incident" despite the definition in the policy as "any act or omission in the furnishing of professional health care services." Guaranty National argues that the "medical incident"occurred when the Medical Center mistyped blood in 1980 resulting in the failure to administer RhoGAM to Mary Ford within seventy-two hours of giving birth.[14] Conversely, the plaintiffs argue that the "medical incident" occurred when Samuel Ford was born. As the plaintiffs correctly point out, generally a tort is not complete

[14]Indeed, the plaintiffs' initial complaint supports this conclusion. The complaint, filed on June 28, 1989, alleges that the North Mississippi Medical Center was negligent during the birth of the second child, Samuel Ford, in 1983. It alleges that Samuel Ford was born in Tupelo and suffered injury as a result of the Medical Center's negligence during his birth. The amended complaint which was filed days later, properly alleges that Samuel Ford was born in Jackson, Mississippi at a different hospital.

until the injury occurs. This is true in toxic torts and in products liabilities as the plaintiffs' cites illustrate. However, the issue in this cause is professional malpractice, not products liability or toxic tort. As Appleman tells us:

> Professional liability policies are generally called malpractice insurance when issued to members of the healing profession where the exposure is largely bodily injury . . . Liability under a malpractice policy is generally limited to professional acts. A "professional" act or service within a malpractice policy is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill and the labor or skill is predominantly mental or intellectual, rather than physical or manual, and in determining whether a particular act is a "professional service" the court must look not to the title or character of the party performing the act, but to the act itself.

Appleman, Insurance Law and Practice (Berdal, ed.) §4504.01. Despite the fact that independent counsel concluded that an "occurrence" policy could allow interpretation of the plaintiff's birth in 1983 as a medical incident, no explanation is offered as to resulting damage to Mary Ford, a named plaintiff. Therefore, if this court were to find the 1983 policies covered the claims in question, it would have some difficulty in determining, under the plaintiff's analysis, when the "tort was complete" in regard to damages sustained by Mary Ford individually.

Putting aside the policy definition of "medical incident," the court finds Appleman to be most persuasive on the subject. In examining the "professional service" for which North Mississippi Medical Center obtained malpractice coverage on the occurrence-type policy, the court finds that the Medical Center was at risk for the birth that occurred within its facility in 1980 and for which a mistyping of blood occurred. To find otherwise--that under the occurrence-type policy, the Medical Center had malpractice coverage for a birth which occurred in a completely different facility makes little sense. Additionally, this argument would appear to expose University Hospital in Jackson to liability simply because the "medical incident" occurred in its facility in 1983. Returning to the policy definition of "medical incident," this court finds that the mistyping of Samuel Ford's brother's blood along with the failure to administer RhoGAM during the 1980 birth are "acts or omissions in the furnishing of professional health care services." Therefore, this court finds that the 1980 professional malpractice insurance policies apply to the claims of the Fords and, accordingly, grants

judgment as a matter of law to Guaranty National.

SUMMARY JUDGMENT MOTION BY USF&G

The plaintiffs amended their complaint to add USF&G as an additional party based upon representations by USF&G that it had tendered its limits for the claim. Through discovery in their action against Guaranty National, the plaintiffs determined that additional coverage may have been available to the plaintiffs to satisfy their claim but, that such had not been disclosed to the plaintiffs by USF&G at the time of settlement. USF&G moves for summary judgment based upon the fact that it has been released by the plaintiffs when they executed the Covenant Not To Sue. In arguing its motion, USF&G states that "subsequent to the filing of the lawsuit, the claims of the Plaintiffs were settled and USF&G, under the terms of the settlement, agreed to pay the limits of its liability insurance policy providing coverage for the North Mississippi Medical Center in the year 1983." USF&G further states that had the Fords intended to preserve their rights to proceed against USF&G for payments under the 1980 policy, they should have provided such by clear language in the settlement agreement.

The Fords responded by alleging that USF&G represented that it had more coverage under its 1983 USF&G policies than under the 1980 USF&G policies, that USF&G represented that Guaranty National had denied coverage and was not interested in participating in the settlement negotiations, and that USF&G was tendering all applicable coverage to settle the claim. The plaintiffs submitted a copy of the claim card for the Medical Center showing claims paid under the 1980 policy. Although there is no explanation as to which policies the claims apply, a notation on the form indicates that the total paid out for claims in 1980 was $43,673.05. According to the plaintiffs, USF&G had available under its 1980 policy either $1,075,000 or $1,056,326.95.[15]

Relevant language in the Covenant Not To Sue is stated as follows:

[15]According to USF&G's response to interrogatory No. 14 to Guaranty National's Interrogatories and Request for Production of Documents, USF&G stated that it had only documented $25,000 paid out under the 1980 policies.

> WHEREAS, based upon certain representations as set out below,
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> . . .
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> NMMC expressly represents to Claimants that the only insurance company acknowledging coverage in the above-referenced action is United States Fidelity & Guaranty Company; USF&G represents and warrants that its remaining limits under the applicable insurance policy providing coverage for the damages alleged in the above civil action are $838,000.00. NMMC additionally acknowledges and represents that another policy of insurance, Number UMB1014155, was written by Guaranty National Insurance Company with NMMC as an insured; however, Guaranty National has denied coverage to NMMC. NMMC makes no representations nor warranties about the coverage available under the Guaranty National policy.

The Covenant then recites the language quoted elsewhere in this opinion. After specifying the distribution of the USF&G funds, the agreement states, "and the remaining $762,000.00 settlement proceeds as defined above shall be collected, if at all, from Guaranty National as hereinafter set forth." Language follows which binds the plaintiffs to the $838,000.00 from USF&G and releases the Medical Center and USF&G from liability of any kind regarding the malpractice claim. Finally, the plaintiffs agreed to "indemnify NMMC and associates from any and all losses, costs, expenses, including attorneys' fees, arising out of or connected with any claim arising out of or in any way connected with the underlying civil action which may be asserted against NMMC and associates by any person, corporation or other entity seeking any remedy beyond the express provisions of this agreement."

While USF&G correctly argues that the plaintiffs have released any rights to additional recovery from USF&G in accordance with the settlement agreement and while the language regarding collection from Guaranty makes use of contingencies, this court finds that USF&G's motion is not well taken.

First, the court does not find that the agreement specifically limits USF&G to allocating the loss to the 1983 policy.[16] On the other hand, the agreement contains many references to USF&G's contribution as being no more than $838,000.00. However, USF&G specifically represented and warranted that it had remaining limits "under the applicable insurance policy" of $838,000. The

[16]As USF&G argues, parties to a contract should provide by clear language those limitations and specifications they desire.

court finds that this language creates a genuine issue of material fact between USF&G's position that the 1983 policies applied and the plaintiffs' position that USF&G represented to the plaintiffs during settlement negotiations that more coverage was available under the 1983 policies than the 1980 policies and that it was tendering all of its limits.[17] Also, the plaintiffs submit and offer proof that, in fact, USF&G had at least $1,000,000 to fund the settlement from the 1980 policy. For whatever reasons, USF&G assumed their position early in the course of this litigation that the 1983 policies applied. As the court has found, this was an erroneous position.

Finally, the court is most disturbed that the agreement would contain language stating that Guaranty National denied coverage. It is very obvious that Jane Brown of Guaranty attempted very diligently to work out an arrangement that would be advantageous to all. Brown appeared to be genuinely concerned about protecting the insured's interest--something new and different in this case. The controversy surrounding the applicable coverage arose at the very beginning of the lawsuit. This dispute was properly between the insurance companies and the insured, just as Brown proposed that it be. To place the plaintiffs in the position of collecting the remainder of the settlement without also apprising them of all the details reeks of bad faith. Had the plaintiffs been aware that Guaranty attempted to facilitate a settlement but that the terms were unacceptable to the Medical Center and USF&G, perhaps the plaintiffs would not have agreed to accepting the assignment. The court is further bothered by the fact that the Medical Center would increase the settlement by $400,000 "in light of Guaranty National Insurance Company's failure to acknowledge coverage in this matter for the $362,000.00."

Additionally, the court notes that the indemnification clause should be subjected to scrutiny. Again, that the plaintiffs would agree to indemnify "NMMC and associates"[18] in connection with "any claim arising out of or in any way connected with the underlying civil action" as well as agree

[17]Among the exhibits submitted is written documentation that USF&G represented to Guaranty National that the 1980 policy limits were impaired and, thus, USF&G was unable to fund the settlement under the 1980 policies.

[18]Clearly, the associates would be USF&G as well as the counsel who represented both.

to pay their attorneys' fees would not be fair to the plaintiffs without benefit of all the facts despite the assignment of rights. The plaintiffs allege that USF&G misrepresented facts and this court finds that on the basis of the information before it, the plaintiffs have raised a genuine issue of material fact. Therefore, USF&G's motion for summary judgment is denied.

An order in accordance with this opinion shall be issued.

SO ORDERED, This the ___ day of November, 1997.

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CHIEF JUDGE